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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 463

JACK D. JOHNSON,

Petitioner,

—v.—

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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IN THE

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OCTOBER TERM, 1968

No. .....

JACK D. JOHNSON,

Petitioner,

—v.—

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas, entered in *Johnson* v. *Stucker,* on April 12, 1969.

Opinions Below

Petitioner was convicted of second-degree burglary and grand larceny in a state district court in Kansas in September, 1964, and sentenced to the Kansas State Industrial Reformatory.[1] On August 16, 1966, he was placed on parole by the Kansas State Parole Board and permitted to return to his home in Story City, Iowa. In June, 1967, petitioner was arrested in Iowa and returned to the reformatory. On

[1] The events and proceedings related in this paragraph occurred prior to the initiation of this suit in the Kansas courts. See R. 10, 11, 45, 56.

July 25, 1967, he was given a statement of charges of parole violation and an interview with the parole board. On July 26, 1967, he was informed by memorandum that his parole had been revoked. He is now a prisoner at the reformatory. The respondent is the superintendent of that institution. No record was made of the proceedings before the parole board.

On February 21, 1968, petitioner filed a petition for habeas corpus in the District Court of Reno County, Kansas (R. 3-5), which held an evidentiary hearing on February 29, 1968 (R. 28-34). That court denied the petition in a memorandum opinion filed March 4, 1969 (R. 10-14). It is unreported and appears in the Appendix, *infra,* p. 15a. The Kansas Supreme Court affirmed on April 12, 1969. 435 Pac. 2d 35. Its opinion is printed in the Appendix, *infra,* p. 1a.

Jurisdiction

The judgment of the Kansas Supreme Court was entered on April 12, 1969. Mr. Justice White granted an extension of time to and including August 10, 1969, within which to file this petition. Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257.

Questions for Review

1. Is a paroled prisoner entitled to a due-process hearing in an action to return him to prison?

2. Is the respondent in a parole-revocation action entitled to the assistance of counsel?

3. May a state parole board revoke a prisoner's parole solely because he has been accused and acquitted of a new crime?

Constitutional Provisions Involved

Article V, Amendments to the Constitution of the United States (in part):

> No person shall . . . be subject for the same offence to be put twice in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . .

Article VI, Amendments to the Constitution of the United States (in part):

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article XIV, Amendments to the Constitution of the United States (in part):

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

All three issues center in the interview which Johnson had with the Kansas State Parole Board on July 25, 1967 (R. 6, 30). He had been informed before that interview, and was informed orally at the interview, that the board proposed to revoke his parole on three grounds: (1) He had not kept regularly employed while on parole. (2) He had failed to cooperate with his parole officer in Iowa. (3) He had been found guilty by a jury of a crime in Iowa, although this verdict was then "set aside on a legal technicality" (R. 6). (The record is that the verdict in Iowa was set aside because of insufficient evidence. *Infra*, p. 7.)

Before the interview with the board, and at the beginning of it, Johnson asked that his attorney be allowed to appear and present evidence. This request was denied before the interview and denied again, orally, during the interview, and Johnson was told "to shut up about it" (R. 30-32).

The board then asked Johnson what his response to the charges was. Johnson denied the first two charges and admitted that he had been tried and acquitted of a new crime in Iowa (R. 31). The record shows no other evidence taken by the board, and no other testimony before it (R. 31-32), although the board later told Johnson's attorney that it had considered a letter he wrote the board, which letter is not in the record (R. 11).

Aside from this letter the only evidence before the parole board was whatever statement Johnson was allowed to make during the unreported board proceedings; the contents of his statement are suggested in his testimony in the state district court (R. 30-34). Johnson and two other

witnesses also testified, without contradiction, that: (1) Johnson had remained continuously employed throughout his period of parole; and (2) Johnson had maintained friendly, cooperative relations with his parole officer in Iowa; his parole officer did not know why he was being returned for parole violation and had not initiated the revocation (R. 29-34). Respondent offered no evidence in the state district court (R. 55). The evidence in the record therefore indicates, without dispute, that: (1) The board had no factual basis for believing that Johnson was not employed continuously in Iowa. (2) Johnson was in fact employed continuously in Iowa. (3) The board had no factual basis for believing that Johnson did not cooperate with his parole officer. (4) Johnson's parole officer had not initiated the revocation and did not support it.

The trial court and the Kansas Supreme Court adopted similar reasoning in ruling against petitioner, holding that there is no federal constitutional right to counsel in state parole-revocation proceedings, that the burden of proof was on petitioner, and that he had failed to meet it. As the Kansas Supreme Court put it, "Parole from confinement in a penal institution prior to serving all of an imposed sentence is a privilege, a matter of grace, and no constitutional right is involved." (App., *infra*, p. 7a.)

The federal questions were raised at all stages of the proceedings—in petitioner's writ of habeas corpus in the Kansas lower court (R. 4-5), and in petitioner's Statement of Points in the Kansas Supreme Court (R. 26-27).

Reasons for Granting the Writ

This case presents a federal question of substance not heretofore determined by this Court (the second issue), and it involves a state decision not in accord with applicable decisions of this Court (the first and third issues). The legal questions presented have also been argued and decided in the United States courts of appeal, and the decisions of the courts of appeal concerning them are in conflict.

1. *Is a paroled prisoner entitled to a due-process hearing in an action to return him to prison?*

The Kansas parole board did not make a record of its proceedings. The evidence in the record taken in the district court in Kansas is that the board met very briefly, took no evidence, kept no record of what it did, and refused to let Johnson respond to the charges or to have his attorney respond for him (R. 31-32). The parole board offered no evidence. The record therefore is that the board acted solely on the written allegations of violation it had itself prepared. It had no evidence, and the Kansas courts had none, to support these allegations. Johnson's own testimony is the only evidence in the record on the revocation hearing (pp. 11-12, 23, 27-28, Reno County District Court record, summarized at R. 29-34):[2]

[2] The transcript of the hearing in the county district court was not a part of the Kansas Supreme Court certified record but has been properly certified by the Clerk of the District Court of Reno County, Kansas and filed here along with the Kansas Supreme Court record.

[On direct examination]:

Q. . . . did you request that an attorney be with you at that hearing? A. . . . Yes, sir.

* * * * *

Q. And was I present . . . ? A. No, sir.

Q. Did you bring this up or was any statement made at the hearing about the request for counsel? A. Yes, sir.

* * * * *

They just said no, and told me to shut up about it.

Q. How many charges are listed on Exhibit A? A. Three.

Q. Are these the only charges that were placed against you . . . ? A. Yes, sir.

Q. Have you examined those charges? A. Yes, sir.

Q. Are they true in any respect? A. The first two aren't true, but the third one is.

Q. What is the third charge, Mr. Johnson? A. Found guilty by jury trial of breaking and entering, although verdict set aside on legal technicality.

* * * * *

[On cross examination]:

Q. . . . what was the legal technicality you were released on [in Iowa], if you know? A. Lack of evidence.

* * * * *

Q. Now, during . . . your hearing before the Parole Board, were you allowed to testify? A. In a sense, yes.

* * * * *

You are allowed to say certain things as long as it goes along with what they think, and if you deviate you are told to shut up "or we will go into another matter."

* * * * * *

I went before them and Mr. Jones read my . . . original sentence . . . and then Mr. Jones told me that I had been returned for violating my parole and then he read [the charges] to me and he asked me if I had anything to say about those charges and I said "Well, for the most part the first two are false," and at this point Mr. Stites said to Mr. Jones "Well, we have heard that before," and I said, "Well, my attorney has pertinent information to submit to you people and I would like to have him present," and he told me "This is a private hearing and we don't allow interference."

Q. . . . Did they have any report or read any report into the record from your parole officer? A. Read into the record?

Q. Yes, or confront you with anything? A. No, sir.

Q. They just said you failed to keep regularly employed and you failed to cooperate with the parole officer's efforts to assist you and you were found guilty of a crime although the verdict was set aside on a legal technicality. And you got up and denied this except the last one? A. Yes.

The Kansas Supreme Court held on this record that Johnson had not sustained the burden of proof on habeas corpus (R. 42-56). The only evidence to which that court referred was Johnson's reply on cross examination that

the first two charges were false "for the most part" (R. 55). That statement, the Kansas Court held, was sufficient to "show the weakness of his case" (R. 55). As to the first two charges, the Kansas Supreme Court held that it would affirm the negative finding of the trial judge "even though no refuting evidence was offered" (R. 56). On the third charge—relating to the acquittal in Iowa—the state court held that "the mere fact that a parolee is arrested, charged, found guilty, but eventually exonerated . . . may be strong indication that the parolee has lapsed in his ways . . ." (R. 56).

This procedure, as affirmed by the Kansas Supreme Court, deprived Johnson of all the elements of a due-process hearing, as Mr. Justice Rutledge (concurring) summarizing them in *In re Oliver*, 333 U. S. 257, 278-79 (1948):

> This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, . . . the rights "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." It takes away the security against being twice put in jeopardy for the same offense and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal.

It was these rights which Mr. Justice Black, speaking for the Court in that case, held to be "basic in our system of jurisprudence." 333 U. S. at 273. Johnson was not ac-

corded one of them; he was not even given a statement from the parole board of the grounds on which his parole was revoked.

Johnson had a federal constitutional right to know what evidence there was that he had violated his parole and to offer an explanation of it. *Bratton* v. *Chandler*, 260 U. S. 110 (1922); *Morgan* v. *United States*, 304 U. S. 1, 307 U. S. 183, 313 U. S. 409 (1938). He had a right to some record or statement of reasons which would demonstrate that the board acted with some factual support. *Garvey* v. *Freeman*, 397 F. 2d 600 (10th Cir. 1968); *Lewes Dairy* v. *Freeman*, 401 F. 2d 308 (3d Cir. 1968), cert. pending, No. 924, Oct. Term 1968; cf. *Dickinson* v. *United States*, 346 U. S. 389 (1953). These rights are essential to any sort of hearing in a free society, and particularly to hearings which result in the deprivation of personal liberty. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950). They have been required by this Court of state administrative agencies. *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954); *Speiser* v. *Randall*, 357 U. S. 513 (1958), and, by other federal courts, of state parole boards. E.g., *United States ex rel. Vance* v. *Kenton*, 252 F. Supp. 344 (D. Conn. 1966).

The application of the Bill of Rights to state parole-board hearings is, however, a principle in need of clarification by this Court. There are at least two federal circuits which hold that the Constitution has virtually no application to parole-board hearings; see *Gonzales* v. *Patterson*, 370 F. 2d 94 (10th Cir. 1966); *Rose* v. *Haskins*, 388 F. 2d 91 (6th Cir. 1968), cert. den. 392 U. S. 946 (1968). Other federal courts of appeal, and some federal district courts and state courts, have held that the Bill of Rights protects ex-convicts. *U. S. ex rel. Frederick* v. *Kenton*,

308 F. 2d 258 (2d Cir. 1962); *Barnes* v. *Reed,* 301 F. 2d 516 (D. C. Cir. 1962); see *Fleming* v. *Tate,* 156 F. 2d 848 (D. C. Cir. 1946); see *Robbins* v. *Reed,* 269 F. 2d 242 (D. C. Cir. 1959); see *Boddie* v. *Wealdey,* 356 F. 2d 242 (4th Cir. 1966); *Hamrick* v. *Boles,* 231 F. Supp. 507 (N. D. W. Va. 1964); *U. S. ex rel. Obler* v. *Kenton,* 262 F. Supp. 205 (D. Conn. 1967); *U. S.* v. *Kenton,* 256 F. Supp. 296 (D. Conn. 1966); *Furnell* v. *State,* 206 So. 2d 23 (Fla. App. 1967). It is important for this Court to clarify the requirement of fundamental fairness in parole-board hearings. This aspect of life in a civilized society demands, as much as any other, the constitutional wisdom Mr. Justice Frankfurter (dissenting) expressed in *Solesbee* v. *Balkcom,* 339 U. S. 9, 25 (1950):

> The fact that a conclusion is reached in good conscience is no proof of its reliability. The validity of a conclusion depends largely on the mode by which it was reached.

2. *Is the respondent in a parole-revocation action entitled to the assistance of counsel?*

This Court held in *Mempa* v. *Rhay,* 389 U. S. 128 (1967), that the Sixth and Fourteenth Amendments require the assistance of counsel at probation-revocation hearings which involve the imposition of sentence. The Court's reasoning compels the conclusion that the same rule applies to parole revocation-hearings, but not all state and lower federal courts have read the opinion that way.

This Court's opinion in *Mempa* emphasizes the application of the Sixth Amendment whenever counsel will be of significant assistance to the prisoner, or whenever the absence of counsel would be a disadvantage to him. This

Court quoted its opinion in *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948) (quoted at 389 U. S. 133):

> . . . counsel . . : could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

And it relied on its opinion in *Moore* v. *Michigan*, 355 U. S. 155, 160 (1957) (quoted at 389 U. S. 133):

> The right to counsel is not a right confined to representation during the trial on the merits.

Both these considerations are obviously important in reference to counsel for petitioner at his parole-revocation hearing, as are other references to the Sixth Amendment in the Court's *Mempa* opinion (389 U. S. 134):

> . . . appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

This Court further emphasized that counsel could be of substantial aid in "marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant. . . ." (389 U. S. 135). And, as if to belie in advance the narrow reading the *Mempa* decision has been given by some state and lower federal courts, the Court said (at 389 U. S. 137):

> . . . a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing.

If, as this Court clearly indicated, counsel may appear in probation-revocation hearings, it follows that counsel may appear in parole-revocation hearings. The difference in a Sixth Amendment context is semantic.

But the *Mempa* decision has created a wide divergence of opinion among state courts of last resort, and among the lower federal courts, particularly in cases of the sort involved here, where the revocation of probation or parole is determined after sentence has been imposed. Some state courts of last resort have held that *Mempa* requires the appointment of counsel at all revocation hearings, whether or not the hearing might also involve sentencing, and whether or not the relevant sentence has already been imposed: *Gargan* v. *State,* 217 So. 2d 578, 579 (Fla. App. 1969) ("The state would have us draw a distinction between the one step procedure used by the State of Washington in *Mempa* and the instant two stage device in which an attorney was appointed to represent defendant at her sentencing. This contention must be rejected."); *Strickland* v. *Melton,* 165 S. E. 2d 90, 95-96 (W. Va. 1968): ("a criminal defendant . . . is entitled to the assistance of counsel at any hearing at which his probation is revoked. . . ."); (see the dissenting opinion at 165 S. E. 2d 90, 100); *State ex rel. Render* v. *Wood,* 165 S. E. 2d 102 (W. Va. 1968); See *People ex rel. Decker* v. *Martin,* 291 N. Y. S. 2d 408 (Sup. Ct. 1968).

Several other state courts of last resort have come to much the same conclusion—or have implied it—in dicta: *State* v. *Holiday,* 153 N. W. 2d 855 (Neb. 1967), modified 155 N. W. 2d 378, 379 (Neb. 1967) (". . . defendant was entitled to legal counsel at public expense in the hearing to revoke the order granting probation. . . ."); *State* v. *Riddell,* 449 P. 2d 97 (Wash. 1969); *State* v. *Seymour,* 237 A.

2d 900 (N. J. App. 1968); *Herrington* v. *State*, 207 So. 2d 323 (Fla. App. 1968). And others exhibit a good deal of internal confusion on the point: *Walker* v. *Langlois*, 243 A. 2d 733 (R. I. 1968); compare *People* v. *Lott*, 162 N. W. 2d 290 (Mich. App. 1968).

Several state courts have restricted the holding in *Mempa* to hearings which combine revocation and sentencing, some of them holding that *Mempa* has no bearing on parole-revocation: *Petition of DuBois*, 445 P. 2d 354, 361 (Nev. 1968) ("... the paramount factors ... in Mempa ... are not present ... where sentencing occurs prior to a determination regarding probation. ...."); *John* v. *State*, 160 N. W. 2d 37, 44 (N. Dak. 1968) ("... the Sixth Amendment right to counsel, when the sentence has been imposed, has not yet been applied to parole or probation revocation hearings."); *People* v. *Follette*, 295 N. Y. S. 2d 565 (Sup. Ct. 1968). And some state courts have apparently reached the same conclusion in dicta, or have implied it: *People* v. *Hernandez*, 166 N. W. 2d 58 (Mich. App. 1968); *State ex rel. Halverson* v. *Young*, 154 N. W. 2d 699 (Minn. 1967).

Lower federal courts are in a similar quandary—some of them holding or stating in dicta that *Mempa* requires counsel at revocation hearings: *Ashworth* v. *United States*, 391 F. 2d 245, 246 (6th Cir. 1968) ("In Mempa ... the Supreme Court held that counsel must be provided at revocation proceedings. ...."); See *Davis* v. *United States*, 288 F. Supp. 180 (W. D. Mo. 1968); *cf. Reed* v. *Butterworth*, 297 F. 2d 776 (D. C. Cir. 1961), and *Barnes* v. *Reed*, 301 F. 2d 516 (D. C. Cir. 1962). And others holding, stating, or implying, that *Mempa* must be limited to its facts—that coun-

sel is required only if the hearing is also for purposes of imposing sentence: *Sorenson* v. *Young,* 282 F. Supp. 1009, 1010 (D. Minn. 1968) (" . . . parole considerations follow . . . as a matter of the state's leniency, largesse and discretion . . ."); *Williams* v. *Patterson,* 389 F. 2d 374, 375 (10th Cir. 1968) ("Parole is a matter of grace."); *United States* v. *Brierly,* 288 F. Supp. 401 (E. D. Pa. 1968); *Sammons* v. *United States,* 285 F. Supp. 100, 101 (S. D. Tex. 1968) ("The situation in Mempa was essentially a deferred sentencing."); *Holder* v. *United States,* 285 F. Supp. 380 (E. D. Tex. 1968); *United States* v. *Hartsell,* 277 F. Supp. 993 (E. D. Tenn. 1967); *Lawson v. Coiner,* 291 F. Supp. 79 (N. D. W. Va. 1968); *Dunn* v. *California Department of Correction,* 401 F. 2d 340 (9th Cir. 1968).

Mempa did little more than extend *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), to every critical stage of the criminal process, including the stage at which a convicted, sentenced prisoner is deprived of his liberty on the charge that he has violated a condition of release. All of the considerations which lay behind the application of the Sixth Amendment to the peculiar facts of *Mempa* apply to the facts of this case.

It is possible to view a parole-revocation hearing as administrative rather than judicial, and benign rather than punitive. But neither distinction makes a Sixth Amendment difference. As the discussion under the first issue, above, indicated, the Bill of Rights applies to administrative hearings. And, as the Court emphasized in *In Re Gault,* 387 U. S. 1 (1967), the Bill of Rights applies even when the state's objectives are benign. In one view, the necessity of counsel follows because the benign hearing has a serious result—as Mr. Justice Black said (concurring) in *Gault* (387 U. S. 61):

> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights. . . .

In another view, adherence to a constitutionally minimum guarantee of fairness serves the benign purposes of the administrative system, as the opinion for this Court in *Gault* emphasized (387 U. S. 20-21):

> . . . Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.

The questions presented here are also of significant impact on the administration of criminal justice. Even though prisoners who have been denied counsel in parole-revocation hearings are disadvantaged in seeking judicial review of state administrative action, about 500 cases involving questions of administrative due process before parole boards have been reviewed in the courts in the past 21 years. See Kimball and Newman's Study, 14 Journal of Crime and Delinquency 1, 3 (1968), and Professor

Cohen's discussion at 47 Texas Law Review 1, 4 (1968). In Kansas alone about ninety-five per cent of all releases from prison are by parole; nationally, the average number of men annually living the half-life of parole, in 1965, was 172,625, and the number is growing. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 61 (1967).

These men today enjoy, as did the juvenile offender in *In re Gault,* 387 U. S. 1 (1967), the worst of two worlds. On parole they are told they must live successfully as free men in an open society. But they are told in the courts that they are not "free," but are living in an extension of the prison yard; the Constitution does not apply to them. They can be returned to prison with no more ceremony than the guard uses in sending prisoners to their cells after exercise. See Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 Texas Law Review 1, 6-7 (1968). Once back in prison they learn that while they were on parole they *were* free, for the time spent on parole does not count against the time to be served on their original sentence. See *Comment,* 39 Notre Dame Lawyer 715 (1964).

Petitioner's case is not an isolated aberration; it is typical of the present parole system. The best statistical estimates indicate that about twenty-five per cent[3] of the 172,000 men now in this status in the United States will lose their liberty in parole-revocation proceedings similar to, or even worse than, the proceeding in which petitioner was returned to prison. Cohen, *supra,* at 6-7.

The numbers of men situated as petitioner is itself demonstrates the substantial dimensions of the questions pre-

[3] President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 62.

sented. The desirability of review in this Court is sharpened, however, by the fact that these men are a deprived, powerless, unpopular minority. They lack cohesion out of prison because they must eschew contact with other "criminal types" under the standard set of conditions on parole. They lack economic resources; they lack that element of attractiveness which will sometimes obtain relief for the disadvantaged; they have little or no chance to obtain a genuine hearing of their claim to basic constitutional rights before the agencies of government which regulate their lives in and out of prison. Cohen, *supra,* at p. 4:

> The deprivational status of "convicted" . . . has served as a powerful conceptual barrier against efforts to bring procedural safeguards and substantive rights to persons so denominated. When a desire to help—the present claim of corrections—is linked with the deprivational status, any complaints . . . tend to be viewed as base ingratitude—or worse.

Thoughtful commentators have characterized this area as one marked by administration without law, applying standards which if made visible and subjected to scrutiny would not pass public inspection. See ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 134-35 (1964). But when men in petitioner's class seek review of these standards and procedures in light of the Constitution, they receive the answer Mempa received from the Supreme Court of Washington, *Mempa* v. *Rhay,* 416 P. 2d 104, 110 (1966), *rev'd* 389 U. S. 128 (1967):

> No appeal, or a petition for a writ of habeas corpus, will be successful in this court where the question is whether the probationer was accorded his constitu-

> tional due process rights at the hearing. *He simply has none.* (Emphasis added.)

This is the standard view—that parolees hold their liberty below the reach of the Constitution; that petitioner and other members of his class have fallen so low that the deprivation of their liberty is beneath the reach of the Bill of Rights. No one will deny that petitioner and other men in his class are indeed ex-convicts—and they will carry that brand for the rest of their lives. But the Constitution does not admit of pariahs; it applies to this petitioner and men in his situation as much as it applies to the rest of us.

Necessary changes in the administration of justice have in fact been recognized by this Court and by others concerned with such problems. This Court recognized in *United States* v. *Wade,* 388 U. S. 218 (1967), that changes in the institutions which detect and adjudicate crime call for changes in the application of the right-to-counsel protection of the Sixth Amendment. The police line-up at issue in that case is a recent development. "When the Bill of Rights was adopted, there were no organized police forces as we know them today." 388 U. S. 224. What the Court there identified as "critical confrontations of the accused . . . at pretrial proceedings," *id.,* is today equally applicable to confrontations which occur between an ex-convict at liberty and parole officials, who seek to deny him his liberty; what the Court said in *Wade* is equally true of the post-release "critical stage" of criminal adjudication (388 U. S. 226):

> It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that

> he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

The importance of counsel at parole-revocation hearings becomes more essential as expanding prison populations increase the number of parole-revocation hearings, or substitutes for them. The argument for summary, secret, often arbitrary administrative action is made for parole boards, but it is the same argument which was made for police line-ups in *Wade,* and juvenile hearings in *Gault*—the argument that they are benign. As a task force of the President's Commission on Crime pointed out:

> [I]t is inconsistent with our whole system of government to grant such uncontrolled power to any officials, particularly over the lives of persons. The fact that a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials.
>
> * * * * *
>
> [T]he fact that rehabilitation may be one aim of correctional treatment does not remove the need for legal controls. Justice Brandeis warned that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."

The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 83 (1967).

Moreover, the task force specifically recommended:

> For some kinds of decisions, such as decisions to revoke probation or parole, offenders should be accorded the basic elements of due process, such as notice, representation by counsel, and opportunity to present evidence and to confront and cross-examine opposing witnesses. *Id.* at 84.

The parent commission found, as this Court found in *Wade*, that modern methods of detection and treatment may have created a need for counsel where none existed in the 18th Century:

> During the period when restraint was the dominant response to crime, there were only two major statuses to differentiate: In prison being punished and out of prison after having served a sentence. Concern for accurate factfinding and proceedural safeguards was therefore focused on adjudication.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 179 (1967).

The Commission pointed to three crucial particulars in parole decision-making, on each of which counsel is obviously critical to due process: (1) the availability of information essential to sound decisions; (2) the assurance that the information presented is relevant to the decision to be made; and (3) the refinement of information presented so that it does not overload the human capacity of the correctional decision-maker. *Ibid.* Petitioner's case illustrates the importance of counsel in assuring these ele-

ments as well as in protecting the accused from the apparent arbitrariness present in parole revocation hearings today.

3. *May a state parole board revoke a prisoner's parole solely because he has been accused and acquitted of a new crime?*

Petitioner was accused of three parole violations: (1) that he had failed to remain employed; (2) that he had not cooperated with his parole officer; and (3) that he had been found guilty by a jury of a new crime, but that the verdict had been set aside on what the parole board called a "legal technicality" (R. 6). The uncontroverted evidence before the Kansas district court was that the first two charges were false, *and* that no evidence was presented to the parole board to support them (R. 29, 32-34). The evidence was further uncontroverted that petitioner had been acquitted of the new crime in Iowa (R. 30). It is impossible to avoid the conclusion that the reason for parole revocation was the Iowa criminal trial, at which petitioner was found not guilty. There is, in fact, uncontroverted testimony that the prosecuting attorney in Iowa, having failed to convict Johnson in the criminal proceeding there, initiated the action to revoke his parole in Kansas (R. 34).

Petitioner's parole was revoked because he had been acquitted in the Iowa trial. The question for this Court is whether a parole-revocation proceeding can be used to deprive him of his liberty for an offense for which he has been acquitted. Petitioner's position is that the parole revocation constituted double jeopardy and deprived him of due process under the Fifth and Fourteenth Amendments. *Benton* v. *Maryland*, —— U. S. —— (June 23, 1969)

(U. S. 37 U. S. L. W. 4623); *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Green* v. *United States*, 355 U. S. 184 (1957).

CONCLUSION

There is no distinction, logically or historically, between a medieval despot whose motives were Godly and a modern committee whose motives are humane. The price a humane government must pay to a free society is the price stated in the Bill of Rights. The petition for a writ of certiorari should be granted, and this Court should reverse the judgment below and require that the Fifth and Sixth Amendments apply as fully to state parole boards as they apply to any governmental official who has it in his power to send a free man to prison.

Respectfully submitted,

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August, 1969

APPENDIX

Opinion of the Supreme Court of Kansas

[FILED APRIL 12, 1969]

No. 45,530

JACK D. JOHNSON,

Appellant,

v.

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Appellee.

SYLLABUS BY THE COURT

1. The right to counsel as a constitutional requirement of due process of law does not extend to a parole revocation hearing before the state board of probation and parole.

2. Under the provisions of K.S.A. 62-2226, *et seq.*, dealing with proceedings before the state board of probation and parole, the parolee is not entitled to have retained counsel present and appear with him as a matter of right at a revocation hearing.

3. Habeas corpus is an appropriate remedy for judicial review of the action of the state board of probation and parole in revoking a prisoner's parole, but the court may only inquire into whether or not the board complied with

applicable statutes, and further, whether its action was arbitrary or capricious.

4. In revoking a parole, the state board of probation and parole is presumed to have had before it information which warranted the order of revocation, and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious. The burden of proof rests on the prisoner, and if he fails to sustain that burden, the courts will not interfere with the board's decision.

5. In a habeas corpus proceeding instituted by a prisoner whose parole had been revoked by the state board of probation and parole, the record is examined, and it is *held,* the refusal of the board to permit the prisoner's retained counsel to be present at the revocation hearing was not a denial of due process, nor was it a violation of any statutes governing such proceedings; and it is further *held,* the district court did not err in its conclusion that the petitioner failed to sustain the burden of proving the board acted arbitrarily and capriciously.

Appeal from Reno district court, division No. 1; WILLIAM A. GOSSAGE, judge. Opinion filed April 12, 1969. Affirmed.

Dennis O. Smith, of Hutchinson, argued the cause, and *Frank S. Hodge, H. Newlin Reynolds, Kenneth E. Peirce,* and *Dan W. Forker, Jr.,* of Hutchinson, were with him on the brief for the appellant.

Raymond F. Berkley, county attorney, argued the cause, and *Kent Frizzell,* attorney general, and *Kerry J. Granger,* assistant county attorney, were with him on the brief for the appellee.

Kent Frizzell, attorney general, and *Edward G. Collister, Jr.,* assistant attorney general, were on the brief for *amicus curiae* state board of probation and parole.

The opinion of the court was delivered by

O'CONNOR, J.: Jack D. Johnson filed a petition in Reno county district court for writ of habeas corpus and release from imprisonment in the state reformatory as a result of revocation of his parole by the state board of probation and parole. The writ was duly issued, and after a hearing the court rendered judgment dissolving the writ and ordering the petitioner remanded to the custody of the respondent. From this judgment and the district court's subsequent order denying his motion for new trial, Johnson has appealed.

The principal questions for our consideration center on the board's denial of the petitioner's request to have counsel present at the revocation hearing, and the propriety of the district court's determination that petitioner had failed to show the action of the board in revoking his parole was arbitrary and capricious.

Johnson was originally convicted in September 1964 of second degree burglary and grand larceny and sentenced to the reformatory. After being incarcerated pursuant to the sentence, he was placed on parole by the state board on August 16, 1966, and permitted to return to his home in Story City, Iowa.

In June 1967 Johnson was arrested on a parole violator warrant issued by the state board and returned to the reformatory. Shortly thereafter he was served a statement of charges alleging that he had violated the conditions of his parole in that (1) he failed to keep regularly employed, (2) he failed to cooperate with the parole officer's efforts

to assist him, and (3) he was found guilty by jury trial in Iowa of breaking and entering, although the verdict "was set aside on a legal technicality." The statement of charges also recited that at the earliest practicable date the board would give Johnson a hearing on the charges and would consider all available information, including any oral or written statements he desired to submit.

The revocation hearing was held July 25, 1967. Although Johnson had retained Mr. Dennis Smith as his counsel, the board denied Johnson's request to have his attorney present at the hearing. By letter dated July 26, Mr. Smith was informed that after giving consideration to the case and "taking into account the information contained in your [Mr. Smith's] letter of July 25, and attachments thereto," the board had entered an order revoking Johnson's parole.

In due course, Johnson, through his attorney, filed a habeas corpus petition alleging, *inter alia,* that he had at all times complied with the terms and conditions of his parole; that although he was arrested for breaking and entering in Story City, Iowa, the information was subsequently dismissed and he was discharged and exonerated of any implication in the crime; that the board in revoking his parole exceeded its statutory power and acted capriciously and in the absence of any information which would entitle it to revoke his parole; and that he was denied the presence of counsel at his revocation hearing, in violation of his constitutional rights. Attached to the petition were the statement of charges and the board's letter to Mr. Smith, to which reference has already been made.

At the habeas hearing, the petitioner, his mother and girl friend testified in support of his allegations. The respondent offered no evidence. Subsequently, the district

judge filed a lengthy memorandum opinion in which he concluded that the board's refusal to permit retained counsel to be present at the revocation hearing was not a denial of due process of law, and that the petitioner had failed to sustain the burden of showing the action of the board in revoking his parole was arbitrary or capricious.

We shall first consider petitioner's claim that denial of the presence of counsel was a violation of the constitutional requirement of due process of law.

The United States Supreme Court has made it clear that an accused's Sixth Amendment right to the assistance of counsel not only applies to federal prosecutions but also is made obligatory upon the states by the Fourteenth Amendment. (*Gideon* v. *Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 733; *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758; *Pointer* v. *Texas,* 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065.) The right to counsel in felony cases has been held to exist not only at "critical" pretrial stages, such as custodial interrogations by law enforcement officers (*Escobedo* v. *Illinois,* supra; *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974, rehearing denied, 385 U.S. 890, 17 L.Ed.2d 121, 87 S.Ct. 11) and out-of-court identifications of suspects at police lineups (*United States* v. *Wade,* 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926; *Gilbert* v. *California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951), but also at the trial itself (*Gideon* v. *Wainright,* supra). In addition, the accused's right to counsel on appeal from a state court conviction was upheld in *Swenson* v. *Bosler,* 386 U.S. 258, 18 L.Ed.2d 33, S.Ct. 996, and *Anders* v. *California,* 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, rehearing denied, 388 U.S. 924, 18 L.Ed.2d 1377, 87 S.Ct. 2094.

In 1948 the high court concluded that the absence of counsel during sentencing after a plea of guilty, coupled with "assumptions concerning his criminal record which were materially untrue," deprived the accused of due process. (*Townsend* v. *Burke,* 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252.) In one of its most recent pronouncements on the subject, *Mempa* v. *Rhay,* 389 U.S. 128, 19 L.Ed. 2d 336, 88 S.Ct. 254, the court held the right extended to the time of sentencing where sentencing had been *deferred subject to probation.* In reaching its decision, the court observed that *Townsend* illustrates the critical nature of sentencing in a criminal case and "might well be considered to support by itself a holding that the right to counsel applies at sentencing."

We do not interpret or construe *Mempa* as extending the constitutional requirement of counsel to parole revocation hearings before the state board of probation and parole. The *Mempa* decision concerned a deferred-sentencing situation, whereas here, sentence had been imposed and the petitioner confined pursuant thereto. The adversary system had been terminated and the correctional and rehabilitative processes of the parole system substituted in its place. Thus, we are no longer concerned with the matter of sentencing or the procedures connected therewith. (*Williams* v. *Patterson,* 389 F.2d 374 [10th Cir. 1968]; *Eason* v. *Dickson,* 390 F.2d 585 [9th Cir. 1968]; *Rose* v. *Haskins,* 388 F.2d 91 [6th Cir. 1968].) A hearing before the parole board is a nonadversary proceeding, and as described in *Washington* v. *Hagan,* 287 F.2d 332 (3d Cir. 1960), cert. denied, 366 U.S. 970, 6 L.Ed.2d 1259, 81 S.Ct. 1934:

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced

and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole." (p. 334.)

Parole from confinement in a penal institution prior to serving all of an imposed sentence is a privilege, a matter of grace, and no constitutional right is involved. (*Jones* v. *Rivers,* 338 F.2d 862 [4th Cir. 1964].) The courts generally have held there is no federally protected constitutional right to counsel at a parole revocation hearing, and that any such right depends entirely upon the existence of statutory provisions. (*Dunn* v. *California Department of Corrections,* 401 F.2d 340 [9th Cir. 1968]; *Williams* v. *Patterson,* supra; *Gonzales* v. *Patterson,* 370 F.2d 94 [10th Cir. 1966]; *Lavendera* v. *Taylor,* 234 F.Supp. 703, affirmed 347 F.2d 989 [10th Cir. 1965]; *Jones* v. *Rivers,* supra; *Hyser* v. *Reed,* 318 F.2d 225 [D.C.Cir. 1963], cert. denied, 375 U.S. 957 [1963]; *Fleming* v. *Tate,* 156 F.2d 848 [D.C. Cir. 1946]. Also, see *Escoe* v. *Zerbst,* 295 U.S. 490, 79 L.Ed. 1566, 55 S.Ct. 818.)

Petitioner's right to the presence of counsel at his revocation hearing arises, if at all, from the provisions of K.S.A. 62-2226, *et seq.* The act authorizes the board of probation and parole to adopt such rules, not inconsistent with the statutes, as it deems proper or necessary with respect to parole eligibility, the conduct of parole hearings, and conditions to be imposed upon the parolee. (K.S.A.

62-2245.) Such rules appear to be exempt from publication in the Kansas Administrative Regulations by the revisor of statutes (K.S.A. 1965 Supp. 77-415[4]). We, nevertheless, have obtained a copy of the rules and regulations which, we understand, have been promulgated by the board and became effective July 1, 1966.

K.S.A. 62-2250 requires that a parolee accused of violation of any of the conditions of his release be brought before the board for "a hearing on the violation charged under such rules and regulations as the board may adopt." 45-1-7(*b*) of the board's regulations provides that a statement of charges of parole violation shall be delivered to the prisoner to permit him to prepare his defense before appearing at the violator hearing.

Before granting a parole in the first instance, the board must have the prisoner appear before it and interview him (K.S.A. 62-2245). Likewise, his appearance is guaranteed at the revocation hearing (K.S.A. 62-2250). While the board is empowered to issue subpoenas requiring the presence of witnesses (K.S.A. 62-2249), it is not required to hear statements or arguments by any person not connected with the correctional system (K.S.A. 62-2248). In fact, the latter statute explicitly says that all persons not connected with the correctional system presenting information or arguments to the board shall submit their statements in writing, and further, shall submit therewith an affidavit stating whether any fee has been paid or is to be paid for their services, and that the amount of any fee for their services in the case was not or is not to be determined on the basis of the granting or denial of parole. This statute, we believe, was intended to apply not only to the hearing when a parole is granted, but also to a revocation hearing.

Careful scrutiny of the foregoing statutes leads us to the conclusion the legislature did not contemplate that a parolee is entitled to have counsel present and appear with him as a matter of right at a revocation hearing. This is not to say that the prisoner is precluded from employing and being represented by counsel; but having done so, counsel's arguments and statements in his client's behalf must be submitted in writing for the board's consideration, together with the affidavit required by K.S.A. 62-2248. Furthermore, our conclusion is unaffected by K.S.A. 62-2250, requiring "the prisoner be brought before the board for a hearing on the violation charged." A similar statute affording the prisoner charged with parole violation the "opportunity to appear" was held not to embrace the right to assistance of counsel. (*Washington* v. *Hagan,* supra.) There, the petitioner did not have counsel, nor was he advised that he had the right to counsel. After emphasizing that it has been the practice for more than fifty years to allow a prisoner a hearing, but not representation by counsel, the court said:

> ". . . We think the practice is right because this matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question. . . ." (p. 334.)

Under statutes similar to those of Kansas, the supreme court of New Mexico had before it the question of a parolee's right to counsel at a revocation hearing in *Robinson* v. *Cox,* 77 N.M. 55, 419 P.2d 253. The court's conclusion is reflected in the following language:

"We reject the contention that a right to counsel at a revocation hearing springs from the due process requirements. In so doing, we must reject the argument that either the board's rules or §41-17-27, supra, are unconstitutional as thus construed. Escoe v. Zerbst, supra; Jones v. Rivers, supra . . . [N]either due process nor the applicable statutes require that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation hearing. See 29 A.L.R.2d 1074, 1097." (p. 50.)

We hold that the board's refusal to permit petitioner's counsel to be present at the revocation hearing was not a denial of due process, nor was the refusal a violation of any statutory enactment governing such proceedings.

Before taking up petitioner's other points which relate to the merits of the district court's decision, we should briefly mention respondent's contention at oral argument that habeas corpus is an improper remedy for testing the action of the parole board.

Respondent urges that habeas lies only to "attack the validity of custody," and here, even if petitioner's allegations were found to be meritorious, he would still remain in "legal custody" under his original sentence, which is not being challenged. K.S.A. 60-1501 explicitly offers the aid of the Great Writ to any person "who is restrained from his liberty." While it is true that a paroled prisoner is one conditionally released from actual custody, he remains in "legal custody" of the institution from which he is released, and constructively is a prisoner of the state. (K.S.A. 62-2245; *Hunt* v. *Hand*, 186 Kan. 670, 352 P.2d 1; *In re Tabor*, 173 Kan. 686, 250 P.2d 793. Also, see *Baier*

v. *State,* 197 Kan. 602, 419 P.2d 865.) Upon a parolee's arrest and confinement as a parole violator, however, constructive custody changes to physical custody or actual imprisonment. Thus, if a prisoner is entitled to be restored to the status of a constructive prisoner of the state, he, in fact, is being unlawfully restrained of his liberty, and may resort to the remedy of habeas corpus. (*Schooley* v. *Wilson,* 150 Colo. 483, 374 P.2d 353.) We are unable to accept respondent's further argument that judicial review of a revocation order of the board of probation and parole must be by proceedings under K.S.A. 60-2101(*a*) instead of by the habeas route. In our view, the appellate procedure for review of the acts of administrative officials or boards provided by that statute was never intended to cover actions of the parole board in revoking a parole. Because the very nature of the board's action in revoking a parole involves the "liberty" of the prisoner, habeas is an appropriate remedy to review the board's decision.

But the extent of judicial review with respect to a determination by the board that parole be revoked is extremely narrow and limited. Our statute (K.S.A. 62-2232) specifically provides the orders of the board "shall not be reviewable except as to compliance with the terms of this act or other applicable laws of this state." This we interpret to mean that in a habeas proceeding the court may inquire into the question of whether the specific terms of the applicable statutes were complied with, and further, whether or not the board's action in revoking a parole was arbitrary and capricious.

The board, in exercising its parole powers under the law, is vested with considerable discretion. In the first instance a prisoner may be granted parole only when the board believes that he is able and willing to fulfill the ob-

ligations of a law-abiding citizen under the supervision of the board. Indeed, there is, to some extent at least, a genuine identity of interest, if not purpose, in the prisoner's desire to be released—the board's policy being to grant release as soon as possible, consistent with public safety and the prisoner's own welfare and rehabilitation. The relationship of the board and prisoner has been described as partaking of *parens patriae*. In a sense, the parole board in revoking parole occupies the role of parent withdrawing a privilege from an errant child, not as punishment but for misuse of the privilege. (See *Hyser* v. *Reed,* supra.)

A revocation hearing is not a trial in the traditional sense, nor is the board necessarily concerned with the commission of a criminal offense. As a matter of fact, a prisoner having been granted conditional freedom on parole, the primary question before the board is whether within its discretion the parolee is still a good parole risk. (*Hendrickson* v. *Pennsylvania State Board of Parole,* 409 Pa. 204, 185 A.2d 581; *Hock* v. *Hagan,* 190 F.Supp. 749 [M.D.Pa. 1960].) By its very nature a revocation hearing does not envision strict observance of technical rules of law and procedure accorded a judicial proceeding. Any relevant information, even though in the form of letters, reports of parole officers, and similar matter, which may aid the board in making its determination, may be considered. The board is presumed to have had before it information which warranted the order of revocation, and its determination of the matter is conclusive unless the prisoner can prove by a preponderance of the evidence the board's action was arbitrary and capricious. That burden rests squarely on the prisoner, and if he fails to sustain the burden, the courts will not interfere with the board's decision. (*Freedman* v.

Looney, 210 F.2d 56 [10th Cir. 1954]; *Lavendera* v. *Taylor,* supra; *Teague* v. *Looney,* 268 F.2d 506 [10th Cir. 1959].)

Petitioner's remaining contentions relate to the district court's conclusion that he failed to sustain the burden of proving the board acted arbitrarily and capriciously. He points to the fact respondent offered no evidence to rebut his testimony and that of his two witnesses to the effect he had fully complied with the conditions of his parole. We need look only to his own testimony to show the weakness of his case. In describing the proceedings at the revocation hearing, petitioner testified the violation charges were read to him and that he told the board "*for the most part* the first two are false." (Emphasis added.) In respect to the burglary offense, the most petitioner had to offer was the judge "just acquitted me of the charge and I was exonerated." From the record, it appears petitioner never at any time contradicted the statement in the charges that he had been found guilty by a jury, although the verdict was later set aside. As previously indicated, at a revocation hearing the board is not concerned with the commission of a criminal offense in a prosecution sense. The mere fact that a parolee is arrested, charged, found guilty, but eventually exonerated, while enjoying the privilege of being at liberty on parole, may be strong indication that the parolee has lapsed in his ways to a sufficient degree to warrant the board's determining he is no longer a good parole risk. At any rate, the burden was on the petitioner to prove the action of the board was arbitrary and capricious, and this the trial court found he had failed to establish.

The finding of the district court was, in effect, a negative finding, which an appellate court will seldom set aside,

even though no refuting evidence was offered. The weight and value of the testimony of witnesses is to be assessed by the trial judge who saw them and observed their manner and demeanor on the stand. Although the trial court cannot arbitrarily and capriciously refuse to consider the testimony of a witness, it is not obliged to accept and give effect to any evidence which in its honest opinion is unreliable, even if such evidence be uncontradicted. (*Collins* v. *Merrick,* 202 Kan. 276, 448 P.2d 1, and cases therein cited.)

Other contentions raised by the petitioner relating to alleged procedural infirmities in respect to the habeas corpus proceedings have also been examined and found to be devoid of merit.

The judgment is affirmed.

Memorandum Opinion of the District Court

[Filed March 4, 1968]

IN THE

DISTRICT COURT OF RENO COUNTY,

KANSAS

No. 16417

JACK D. JOHNSON,

Petitioner,

vs.

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

On February 21, 1968, the petitioner filed a petition for a writ of habeas corpus.

Petitioner shows by his pleadings and evidence that on or about September 18, 1964, he was convicted of the crimes of second degree burglary and grand larceny and was sentenced to concurrent sentences of five to ten years and one to five years respectively on the charges, said sentences to be served at Kansas State Industrial Reformatory, Hutchinson, Kansas; that pursuant to said sentences, he subsequently was incarcerated there.

On August 16, 1966, petitioner was placed on probation by the Kansas Board of Probation and Parole, State Office Building, Topeka, Kansas.

Thereafter, petitioner was arrested on a parole violation warrant issued by the Kansas Board of Probation and Parole. He was served a notice of charges against him on June 20, 1967, alleging that the petitioner

1. Failed to keep regularly employed.
2. Failed to cooperate with parole officer's efforts to assist you.
3. Found guilty by jury trial of breaking and entering, although verdict set aside on legal technicality.

He was further informed that the Board of Probation and Parole would give him a hearing at the earliest practicable date; that the Board would consider all available information concerning the charges, including any oral or written statements he desired to submit. Petitioner acknowledged the receipt of a copy of the notice of charges dated June 20, 1967, with a notation, "The above charges are incorrect."

On or about July 25, 1967, the Kansas Board of Probation and Parole conducted a hearing on the charges alleged, and thereafter revoked the petitioner's probation by a letter to petitioner's counsel, dated July 26, 1967. The Board in its notice of revocation expressly stated that they had given consideration to the information furnished them by letter and attachments on the date of the hearing.

Petitioner alleges that he has at all times complied with the terms and conditions of his parole; that he was arrested on the charge of "breaking and entering" and was tried by a jury in the District Court of Story County, Iowa, and found guilty at said trial but that said conviction was set aside by the District Court of Story County, Iowa; that the Board acted capriciously and in the absence of any in-

formation which would form a basis for revocation, and that the Board is attempting to punish the petitioner for a crime for which he was exonerated; that he was denied the presence of counsel at his hearing before the Board, thus violating the Constitutional rights of the petitioner.

An order was served on the respondent to produce the petitioner for a hearing on this petition on February 29, 1968, at 2:00 o'clock, P.M., which order was complied with and petitioner produced to give evidence in support of his petition. No answer was filed by the respondent, but he appeared in person and by Richard J. Rome, Reno County Attorney, and the issues were joined on his oral denial of any illegal detention.

It cannot be denied that the writ of habeas corpus extends to exceptional cases where there has been a disregard of the constitutional rights of the accused and where the writ is the only means of preserving his rights or where the state proceedings fail to meet procedural fairness under the 14th Amendment. (*Walley* v. *Johnston,* 316 U.S. 101, 104, 105; 86 LEd 1302, 1304 (1942))

The burden of proof is upon the petitioner to prove the allegations of his petition by clear and convincing evidence. (*Christakos* v. *Hunter,* 161 F2 692, 10th Cir. (1947) Cert. denied 332 US 801; 92 LEd 381.)

The petitioner's right to probation is not a vested right, but is an act of grace and is granted as a privilege, *Yates* v. *United States,* 308 F2 737, 10th Cir. (1962). Thus, probation is not a "suspension of sentence but the substitution of a lower grade of punishment by legal custody and control of the petitioner outside prison. *Jenkins* v. *Madigan,* 348 U.S. 842, 99 LEd 664 (1954).

While habeas corpus is a proper remedy to test the Board's jurisdiction and the other aspects of due process

which are applicable to a parolee's limited rights (*Hayes* v. *Taylor,* 324 F2 727), the findings of the Board are conclusive on the trial court if made within the jurisdiction conferred upon it, unless the board acted arbitrarily, capriciously or fraudulently, *Powell* v. *Hunter,* 172 F2 330, CCA, Kansas (1940). The petitioner's contentions that he fully complied with the terms of his conditional release and that his parole should not have been revoked involves an administrative matter into which the Court may not inquire on habeas corpus in the absence of a showing by clear and convincing evidence showing that the Board's action in revoking the parole was arbitrary and capricious and not founded upon reliable information. *Lavendera* v. *Taylor,* 234 FSupp 703, Affd. 347 F2 989.

From a review of the record in this case, the petitioner has failed to sustain the burden of proof placed upon him to show that the action of the board was arbitrary or capricious.

The petitioner was informed of the charges of parole violation which were placed against him, was given the opportunity to be heard and to present his evidence which the record shows was considered by the Board.

The Board did not provide petitioner with counsel at his hearing before the Board. Relative to procedural due process, the Supreme Court of the United States has indicated that while a petitioner is entitled to be heard, this does not mean that he may insist on a trial in any formal sense. The Federal District Court for Kansas has adopted the view that a hearing before a Parole Board is a formal non-adversary proceeding at which the alleged violator has no federally guaranteed right to legal representation. Failure to permit the petitioner to have counsel present at the hearing on revocation under the circumstances as

shown by this case was not a denial of due process within the meaning of the Constitution. *Lavendera* v. *Taylor,* 234 FSupp. 703, 705, citing *Still* v. *Taylor,* No. 3214, H.C. (D. Kansas) (1961).

Every reasonable presumption in favor of the validity of the proceedings of the Board should be indulged. *Hunter* v. *Thomas,* 173 F2 810, 10th Cir. (1949); *Roscoe* v. *Hunter,* 144 F2 91, 10th Cir. (1944).

Indulging this presumption and from the record here presented the Court finds and concludes as follows:

(1) Petitioner is in lawful custody of the respondent.

(2) Petitioner was adequately represented by competent counsel in this habeas corpus proceeding.

(3) The petitioner was not deprived of any right guaranteed by the constitution.

(4) The proceedings before the State Board of Probation and Parole meet the test of procedural fairness.

(5) Petitioner is not illegally restrained by his liberty.

(6) Petitioner is not entitled to his release.

It is the judgment and order of the Court that the writ be dismissed and discharged and the petitioner remanded to the custody of the respondent, Kansas State Industrial Reformatory, Hutchinson, Kansas.

Dated this 4th day of March, 1968.

W. A. GASSAGE
District Judge—Div. I

SUPREME COURT, U. S.

FILED

OCT 1 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 463

JACK D. JOHNSON,
Petitioner,

vs.

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1969.

No. 463

JACK D. JOHNSON,
Petitioner,

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NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Kansas Supreme Court, on April 12, 1969, affirmed the decision of the District Court of Reno County, Kansas, denying petitioner relief in a habeas corpus action. *Johnson* v. *Stucker*, 203 Kan. 253, 435 P.2d 35. Prior to the habeas corpus action filed in the state district court, petitioner's parole from confinement at the Kansas State Industrial Reformatory, Hutchinson, Kansas, had been revoked following a hearing by the Kansas State Board of Probation and Parole in a letter-memorandum of July 26,

1967 (R. 41). No records of the parole revocation hearing before the State Parole Board were introduced in evidence during the state habeas corpus action. The opinion of the Kansas Supreme Court and the opinion of the Reno County District Court are set out in the appendix to the petition, pages 1a and 15a, respectively.

JURISDICTION

Petitioner attempts to assert jurisdiction of this Court under 28 U.S.C. Sec. 1257. Respondent contends this Court does not have jurisdiction for two reasons. Petitioner's case is presently moot. Petitioner attacks only the validity of his incarceration in a penal institution, not the validity of his conviction. Petitioner was released from that institution on September 9, 1969, by an administrative parole issued by the Kansas Board of Probation and Parole.

Petitioner asserts that three issues concerning federal questions are presented in the petition. Two of those alleged federal questions (*Question 1*: Is a paroled prisoner entitled to due-process hearing in an action to return him to prison?; *Question 3*: May a state parole board revoke a prisoner's parole solely because he has been accused and acquitted of a new crime?) are not properly before this Court, as they were never presented to the Kansas Supreme Court.

QUESTIONS FOR REVIEW

1. Will this Court take jurisdiction in a case brought to attack institutionalization where petitioner is no longer institutionalized?

2. Will this Court take jurisdiction where alleged federal questions have not been presented to the highest court of the state from whence the petition arose?

3. Do the Kansas statutes concerning parole hearings and parole revocation hearings which allow alleged parole violators to be represented by counsel, but which does not require the parole board to hear counsel representing the alleged violator in person at the parole revocation hearing, violate the Federal Constitution?

STATUTES INVOLVED

28 U.S.C.A. § 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

K.S.A. 62-2226:

"This act shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs, and potentialities as revealed by a case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation, under probation supervision instead of in correctional institutions, or under parole supervision when a period of institutional treatment has been deemed essential, whenever it appears desirable in the light of the needs of public safety and their own welfare."

K.S.A. 62-2233:

* * *

"The presentence report, the preparole report, and the supervision history, obtained in the discharge of official duty by any member or employee of the board, shall be privileged and shall not be disclosed directly or indirectly to anyone other than the board, the judge, the attorney general, or others entitled under this act to receive such information, except that the board or court may in its discretion permit the inspection of the report or parts thereof by the defendant or prisoner or his attorney, or other person having a proper interest therein, whenever the best interest or welfare of a particular defendant or prisoner makes such action desirable or helpful."

K.S.A. 62-2245:

* * *

"Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board."

* * *

K.S.A. 62-2249:

"The board shall have power to issue subpoenas requiring the attendance of such witnesses and the production of such records, books, papers, and documents as it may deem necessary for investigation of the case of any person before it. * * *"

K.S.A. 62-2250:

"At any time during release on parole or conditional release the director may issue a warrant for the arrest of a released prisoner for violation of any of the conditions of release, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. * * *

"Upon such arrest and detention, the parole or probation officer shall immediately notify the director and shall submit in writing a report showing in what manner the prisoner had violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the director shall cause the prisoner to be brought before the board for a hearing on the violation charged, under such rules and regulations as the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release, or enter such other order as it may see fit."

* * *

RULES OF COURT

U. S. Sup. Ct. Rule 23 (1) (f):

1. The petition for writ of certiorari shall contain in the order indicated—

* * *

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

* * *

Kan. Sup. Ct. Rule 6(d):

* * *

(d) *Statement of Points.* Each appellant shall serve and file with his designation of the record a concise statement of the points on which he intends to rely and which will be briefed in the appeal. The points shall be without duplication, and each point shall state a particular and ultimate issue with reference to which reversible error is claimed to have been committed, but only such detail is required as will (1) enable opposing parties to judge the sufficiency of the designated record on appeal, and (2) inform the Supreme Court of the specific issues to be considered. * * *

STATEMENT OF THE CASE

Johnson was convicted of second-degree burglary and grand larceny in September 1964 and sentenced to the Kansas State Industrial Reformatory (R. 1, 10, 12). Johnson was placed on probation by administrative order of the Kansas Board of Probation and Parole on August 16, 1966, and allowed to return to his home in Story City, Iowa (R. 1, 10, 12). Johnson was later arrested on a parole-violation warrant issued by the Kansas Board of Probation and Parole pursuant to K.S.A. 62-2250 and returned to the state of Kansas. A notice of the charges against Johnson was served upon him June 20, 1967. An oral hearing before the State Board of Probation and Parole was held on July 25, 1967 (R. 11). A letter from the board addressed to Mr. Dennis O. Smith, Attorney at Law, Hutchinson, Kansas, Johnson's retained counsel, indicated that the board had determined to revoke Johnson's parole (R. 41.) That notice of revocation specifically stated that the board "gave further consideration to the case of Jack D. Johnson, taking into account the information contained

in your letter of July 25 and attachments thereto." (R. 41).

The record does not reflect that any attempts were made to secure records, documents, or testimony of witnesses on behalf of Johnson in the state administrative parole revocation hearing. The record does not reveal any indication that any attempt was made in the state habeas corpus proceeding to subpoena unsuccessfully any records, documents or persons connected with the State Board of Probation and Parole. The transcript of testimony taken on the state habeas corpus proceeding was not made a part of the record before the Kansas Supreme Court, but was supplied independently of that record by counsel for petitioner (Petitioner's Petition for Writ of Certiorari, p. 6, note 2). The state trial court determined as a matter of state law that Johnson had not sustained his burden of proof that the action of the State Board of Probation and of Parole was arbitrary and capricious, that Johnson was not entitled to relief on his allegations of procedural irregularities in the state habeas corpus procedure, and that Johnson was not entitled to be represented by his retained counsel at the administrative parole revocation hearing on July 25, 1967 (R. 10-14), and the Kansas Supreme Court affirmed on appeal.

Johnson was represented by counsel prior to the parole revocation hearing (R. 30, 41).

ARGUMENT

I. The Petition Is Moot Because Johnson Is No Longer Institutionalized.

The validity of action of the Kansas Board of Probation and Parole revoking Johnson's parole in 1967 is questioned by the petition for certiorari. The habeas corpus

action brought in the state district court attacked only the validity of institutionalization (R. 4-5). The validity of the conviction upon which Johnson was originally institutionalized was not challenged. Consequently, should Johnson have prevailed at any step in the trial or appellate procedure of his habeas case the relief to which he was entitled was released from the Kansas State Industrial Reformatory. He still would have been validly convicted, and still serving his sentence on the prior parole.

On September 9, 1969, a second parole was granted by the Kansas Board of Probation and Parole to Johnson. He has subsequently returned to Story City, Iowa, his home. Since he is no longer incarcerated in the Kansas State Industrial Reformatory any relief which he might receive under the action presented herein would be moot. He has already received that relief in effect by his release from the state reformatory. There "is no subject-matter on which the judgment of this Court could operate. . . ." *Parker* v. *Ellis*, 362 U.S. 574, 575 (1960); *Ex parte Baez*, 177 U.S. 378, 390 (1899) The petition for certiorari should therefore be denied for mootness. *Parker, supra.*

The doctrines announced recently by this Court in *Caracas* v. *LaVallee*, 391 U.S. 234 (1968) and *Peyton* v. *Rowe*, 391 U.S. 54 (1968), are inapplicable (1) because a state habeas corpus action is the subject of the litigation, and (2) on the facts since this case concerns only institutionalization.

II. This Court Does Not Have Jurisdiction to Review Allegations of Error That Were Not Presented to the Kansas Supreme Court.

The petition alleges Johnson was deprived of a due-process hearing in the administrative parole revocation proceeding in violation of federal constitutional rights.

He alleges this in two contexts. From a broad viewpoint, he alleges that the entire proceeding deprived him of due process because his parole was revoked without allowing him a chance to respond to the charges, know of the charges, or confront the witnesses against him (Petition for Writ of Certiorari, pp. 9-11). He then makes a more specific allegation that since his retained counsel was not allowed to appear with him at the parole revocation hearing, he was deprived of due process (Petition for Writ of Certiorari, pp. 11-22). While the latter question was considered by the Kansas Supreme Court in its opinion affirming denial of habeas corpus relief, the former question was not presented to the Kansas Supreme Court. The statement of points (R. 25-26) required by state law [Kansas Supreme Court Rule 6(d)] relates to trial court rulings concerning the *habeas corpus proceeding itself* (Points 1, 2, 3, 5, 6); alleges that the trial court's ruling was contrary to the evidence that was introduced in the trial court (Points 7, 8); alleges that the trial court erred in concluding the Board of Probation and Parole had not exceeded its state statutory authority (Point 9); alleges the trial court erred in concluding that petitioner did not have an absolute right to counsel present at the parole revocation hearing (Points 4, 10); and catchall allegations that the previously stated errors would entitle petitioner to habeas relief (Points 11, 12). The opinion of the Kansas Supreme Court on petitioner's appeal clearly reveals that the only "due process" argument that was presented to that court concerned representation by counsel at the parole revocation hearing. *Johnson* v. *Stucker*, 203 Kan. 253, 255-261, 453 P.2d 35, 39-41 (1969). The remainder of the contentions determined by the Kansas Supreme Court, as indicated in that opinion, related to questions under state law (1) as to whether or not petitioner had sustained the burden of proving his allegations of arbitrary and

capricious action on the part of the Board of Probation and Parole, as (2) of procedural infirmities in the habeas corpus proceeding. *l.c.* 261.

The allegation, made for the first time before this Court, that Johnson was deprived in a broad sense of a due-process hearing before the Board of Probation and Parole was not presented to the state district court, nor was it presented to the Kansas Supreme Court on appeal. Consequently, this Court is without jurisdiction to consider the matter. *Ellis* v. *Dickson,* 349 U.S. 458, 460 (1955); *Edelman* v. *California,* 344 U.S. 357, 358-59 (1953). This is true, irrespective of the fact that the only argument which may properly be presented to this Court arises under the same constitutional protection of the Fourteenth Amendment, *i.e.*, the due-process clause. *Wilson* v. *Cook,* 327 U.S. 474, 484 (1946).

Rule 23(1)(f) of this Court specifically provides, where a review of a state court judgment is sought, that

> "the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Although we feel the references in petitioner's statement of the case do not meet the technical requirements of this rule, we have read those references and attempted to discern the manner and method by which this particu-

lar argument was presented to the trial court and the Kansas Supreme Court. The only specific reference in those proceedings to a due-process right concerns allegations of right to counsel which are presented in a separate and distinct argument (Question 2 of the petition). The petition has not met the requirements of Rule 23(1)(f). Petitioner has not reasonably presented the alleged federal question to the courts of the State of Kansas.

Petitioner's third allegation concerns an alleged violation of his Fifth and Fourteenth Amendment rights against double jeopardy. The argument presented heretofore under this heading is applicable to this allegation also. Suffice it to say that the "double jeopardy" claim does not appear in the original petition for writ of habeas corpus (R. 3-5), the statement of points (R. 25-27), or the opinion of the Kansas Supreme Court. *Johnson, supra.* This argument was not presented to the Kansas courts, and is presented for the first time in the petition for certiorari. Accordingly, this Court is without jurisdiction to hear it. *Ellis, supra; Edelman, supra.*

We note with interest counsel for petitioner apparently has filed with the Clerk of this Court the transcript of the habeas corpus proceeding had in the District Court of Reno County, Kansas. Admittedly, this transcript was not a portion of the record certified to this Court by the State Supreme Court, and was not before the State Supreme Court (Petition for Writ of Certiorari, p. 6). We assume that, because counsel for petitioner saw fit to transmit this document to the Court and refer to it in their petition, they attach some significance to it. We only invite the Court's attention to the rule that review on petition will consider only the record in this Court as certified to it by the State Supreme Court. *Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958). Although we have not taken the occasion to

violate what we consider proper procedure, should the Court determine this rule inapplicable in this case, we would also be more than willing to present authenticated copies of records of the Kansas Board of Probation and Parole concerning the revocation hearing at issue herein.

III. The Kansas Administrative Parole Statutes, Which Allow Representation by Counsel in Revocation Cases but May Not Allow Counsel to Be Present at the Hearing, Are Constitutional.

One reading the petition for certiorari and comparing that document with the Kansas statutes concerning parole revocation hearings and the record is at once struck with the dissimilarity of the case presented by the petition and the actual parole revocation procedure constructed by the Kansas statutes. The petition creates the impression that Johnson was summarily extracted from Story City, Iowa, thrust before the administrative tribunal hearing the parole revocation proceeding, denied all assistance in his behalf, not given an opportunity to explain or defend against the parole violations alleged against him, and that he subsequently suffered a summary parole revocation. As a matter of both state law and fact, this is erroneous.

Under K.S.A. 62-2245 (p. 4, *supra*), the Board of Probation and Parole is granted authority to place on parole, or release from confinement, any person confined in a state institution when "in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself." Parole revocation proceedings are authorized by K.S.A. 62-2250 (p. 4, *supra*). That statute provides that during the parole, the Director of Probation and Parole may issue a warrant for the apprehension of a parolee when it is alleged he has

violated the conditions of his parole. The statute specifically provides that notice of the charges shall be served personally upon the prisoner. As a matter of fact, Johnson was served with such a notice on June 20, 1967 (R. 6). The parole revocation hearing was held July 25, 1967. There is no allegation that there was not sufficient time to become aware of the nature of the charges contained in the notice, and prepare a response. K.S.A. 62-2250 also provides for a parole revocation hearing. Such a hearing was held, and Johnson personally appeared at the hearing.

K.S.A. 62-2248 permits the Board to refuse to hear arguments presented by an attorney *in person* at the hearing itself. This statute also specifically authorizes persons "not connected with the correctional system", such as a retained attorney in this case, to present their arguments in a written form to the Board for its consideration. The record affirmatively indicates that Mr. Dennis Smith, the retained attorney of whose assistance Johnson alleges he was deprived, actually did file written documents pursuant to the authority granted by this statute with the Board (R. 41). The record also reflects that this material was considered by the Board prior to the time it revoked Johnson's parole (R. 41).

K.S.A. 62-2249 (p. 4, *supra*) authorizes the Board to issue subpoenas or compel the attendance of witnesses or the production of records in any of its proceedings. The record does not indicate that Johnson or his retained counsel at any time ever requested the production of any witness or any document.

The question presented by the petition for certiorari is whether or not a parolee "in a parole-revocation action [is] entitled to the assistance of counsel." (Petition for

Certiorari, p. 11). The abstract issue presented by this question is not relevant to the facts arising under the Kansas statutes and more significantly this case. Johnson did have the assistance of counsel. Admittedly, Johnson did not have counsel actually present with him during the time he was granted an oral hearing with the state board. Therefore, the precise question which must be presented by the petition is not the abstract one stated previously, but the more specific question whether the Kansas statutory scheme work which allows representation of counsel to the extent of submission of arguments in a written form to the Board of Probation and Parole, but which allows the Board in its discretion to refuse to personally hear the arguments of counsel, or permit the attendance of counsel at the hearing, denies petitioner the right to counsel under the Sixth and the Fourteenth Amendments. We respectfully submit that it does not.

Although we feel this case should be dismissed for want of jurisdiction, we shall proceed to present argument on the merits of the right-to-counsel issue. The abstract principle presented in the petition, when considered in light of the foregoing analysis of Kansas statutes, must be construed to allege that because Johnson did not have counsel present with him in the hearing room during his hearing before the parole board, his Sixth and Fourteenth Amendment right to counsel was violated.

We have extensively researched the question whether these federal rights require counsel *at* administrative parole revocation hearings. Contrary to the position set out in the petition for certiorari, we conclude the overwhelming weight of authority is that no such right to counsel exists at the administrative parole revocation hearing.

We are unable to find any Federal Circuit Court decision holding, on the basis of the Sixth and/or Fourteenth Amendment that counsel is required at administrative parole revocation hearings. As a matter of fact, *we find unanimous authority to the contrary.* The circuits in which we were able to discover fairly recent opinions have all held that the Sixth and Fourteenth Amendment rights to counsel, even subsequent to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Mempa* v. *Rhay*, 389 U.S. 128 (1967), have no application to administrative parole revocation hearings. *Third Circuit—Washington* v. *Hagan*, 287 F.2d 332, 334 (3rd Cir. 1960), *cert. denied*, 366 U.S. 970 (1961); *Fourth Circuit—Jones* v. *Rivers*, 338 F.2d 862, 864, 872 (4th Cir. 1964); *Sixth Circuit—Rose* v. *Huskins*, 388 F.2d 91, 95 (6th Cir. 1968), *cert. denied*, 392 U.S. 946 (1968); *Seventh Circuit—Richardson* v. *Markley*, 339 F.2d 967, 969 (7th Cir. 1965), *cert. denied*, 382 U.S. 851 (1965); *Ninth Circuit—Dunn* v. *California Department of Corrections*, 401 F.2d 340, 342 (9th Cir. 1968); *Eason* v. *Dickson*, 390 F.2d 585 (9th Cir. 1968), *cert. denied*, 392 U.S. 914 (1968); *Williams* v. *Dunbar*, 377 F.2d 505, 506 (9th Cir. 1967), *cert. denied*, 389 U.S. 866 (1967); *Tenth Circuit—Williams* v. *Patterson*, 389 F.2d 374, 375 (10th Cir. 1968); *Gonzales* v. *Patterson*, 370 F.2d 94, 94 (10th Cir. 1966); *D.C. Circuit—Hyser* v. *Reed*, 318 F.2d 225, 237, 238, 239 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 957 (1963).

Recent decisions of the federal district courts are in accord. *See, e.g., Lawson* v. *Coiner*, 291 F. Supp. 79, 82-83 (N.D. W.Va. 1968); *United States* v. *Brierly*, 288 F. Supp. 401, 401 (E.D. Pa. 1968); *Holder* v. *United States*, 285 F. Supp. 380, 381-382 (E.D. Tex. 1968); *Sammons* v. *United States*, 285 F. Supp. 100, 102 (S.D. Tex. 1968); *Sorensen* v. *Young*, 282 F. Supp. 1009, 1010 (D.C. Minn. 1968); *United States* v. *Hartsell*, 277 F. Supp. 993, 995 (E.D. Tenn. 1967).

Further, our review of the recent state court decisions indicates that an overwhelming majority of those decisions subsequent to *Mempa* also hold that there is no federal right to counsel at an administrative parole revocation hearing. *See, e.g., Johnson* v. *Wainwright*, 208 So.2d 505, 505-6 (Fla. 1968); *Wingo* v. *Lyons*, 432 S.W.2d 821, 823 (Ky. 1968); *Saunders* v. *Michigan Parole Board*, 166 N.W.2d 278, 279 (Mich. Ct. App. 1968); *Smith* v. *Warden, Nevada State Prison*, 450 P.2d 356, 357 (Nev. 1969); *Johnson* v. *State*, 160 N.W.2d 37, 44-45 (N.D. 1968); *Murray* v. *State*, 444 P.2d 236, 237 (Okla. Crim. 1968); *Beal* v. *Turner*, 454 P.2d 624, 625-6 (Utah 1969); *Folkes* v. *Turner*, 449 P.2d 649, 649 (Utah 1969); *Riggins* v. *Rhay*, 450 P.2d 806, 808, 809 (Wash. 1969).

We have examined the federal cases cited by counsel for petitioner and find them not in point. For example, in *Ashworth* v. *United States*, 391 F.2d 245 (6th Cir. 1968), the Sixth Circuit held that in a federal probation revocation hearing where *sentence had not been pronounced*, similar to *Mempa*, counsel is required. The Sixth Circuit noted that in *Ashworth* that not only had the sentence not been determined and pronounced but there existed a great deal of judicial discretion concerning the length of sentence. *l.c.* 246. The remaining federal cases cited concern statutory interpretations of various federal statutes providing the procedure upon which federal parole or probation may be revoked. The context in which those cases arises is significant because the basis of the holding in such cases is that as a matter of *statutory construction* counsel may be required. *Compare, Hyser* v. *Reed*, *supra*; at 237-239, with *Barnes* v. *Reed*, 301 F.2d 516, 517-8 (D.C. Cir. 1962); *Reed* v. *Butterworth*, 297 F.2d 776, 778 (D.C. Cir. 1961).

The state cases cited in the petition (pp. 13-14) concern factual situations analogous or similar to *Mempa*. They all concern deferred or suspended sentences. None of the cited cases involves an administrative parole.

The petition by a gross generalization characterizes the administrative parole revocation hearing in the same class with sentencing procedures, including probation with deferred sentencing. There are obvious and fundamental distinctions which have continuously been noted by the courts considering the respective proceedings. Noteworthy in that regard is this court's holding that formal due process procedural requirements do not apply to an administrative parole revocation hearing. *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935). The Sixth Amendment guarantee of right to counsel applies to "criminal proceedings." While the imposition of sentence may be a portion of a criminal proceeding in that the activity of the court vis-a-vis a criminal defendant has not yet been completed, such that right to counsel is required under the Sixth Amendment (*Townsend* v. *Burke*, 334 U.S. 736 [1948]), the same situation does not exist after sentence has been pronounced, the criminal defendant committed to a state institution, and, by virtue of authority granted by the state legislature, been conditionally released from behind the walls of the institution to serve a portion of his already-pronounced sentence in the community. Consequently, the Sixth Amendment right to counsel does not apply to an administrative revocation hearing because the latter is not part of a "criminal prosecution." *See, e.g., Hyser* v. *Reed, supra*, at 237; *People* v. *Follette*, 295 N.Y.S.2d 565, 571-72 (N.Y. Sup. Ct. 1968); *Saunders* v. *Michigan Parole Board, supra*.

> "When a court suspends the pronouncement of sentence, the judicial process has not been completed. It

remains in a state of suspense; not so in the case of a prisoner who has been sentenced in a prison." *Ex parte Anderson*, 229 P.2d 633, 640 (Ore. 1951).

Indeed, the procedure whereby the criminal defendant living in the community is returned to an institution has been aptly analogized to a transfer of an inmate of one institution to another institution. *See, People* v. *Villareal*, 68 Cal. Rptr. 610, 616 (Ct. App. Cal. 1968). Under Kansas procedure, a parolee is in the "legal custody of the institution from which he was released but shall be subject to the orders of the board, . . ." while he is on parole. K.S.A. 62-2245. Being continually in the custody of the state administrative agency charged with management of the parole system, the fact that the parolee is in the community when transferred back to the institution should not change the nature of the proceeding from that of a mere institutional transfer.

For purposes of analysis under Sixth Amendment rights or rights guaranteed by the due process clause of the Fourteenth Amendment, we urge that the administrative parole revocation hearing is quite significantly different from the suspended sentence probation or parole revocation hearing. The former is purely an administrative proceeding, and the latter is a continuation of the judicial process which commenced with arrest and will end with institutionalization. *Mempa* v. *Rhay, supra*, was simply an application of the principle previously recognized by this Court in *Townsend* v. *Burke, supra*. In *Mempa, supra, Ashworth, supra*, and other like cases, the judicial proceedings have not been terminated and the criminal defendant is still subject to being sentenced. Different considerations are present when considering the administrative parole.

A parolee has been sentenced. His position in the adversary system of justice has been terminated and in its place substituted the correctional or treatment process. *Rose, supra,* p. 94; *Williams* v. *Dunbar, supra,* p. 506.

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole." (*Washington* v. *Hagan, supra,* at 334).

The Kansas administrative probation and parole statutes are taken almost verbatim from the Standard Probation and Parole Act of 1955 promulgated by the National Probation and Parole Association. Concerning the issue of representation by counsel at the parole revocation hearing, section 22 of that act is similar to K.S.A. 62-2248. The authors of the act comment on the section as follows:

> "Improper activities of paid attorneys have done much to bring parole into disrepute in many states. Some attorneys solicit business from prisoners, representing that they have influence to get paroles for a fee. The representation is, unfortunately, well founded in some states. Even attorneys who are members of the legislature present cases before some parole boards in spite of the fact that in doing so they may be exerting improper influence by reason of their power to oppose appropriations and policies of the state officers who compose the parole board.
>
> "In general, it is undesirable to have attorneys or relatives and friends of the prisoner present when the parole board is interviewing and discussing his

potentialities for parole." "Standard Probation and Parole Act," National Probation and Parole Association, 1955, p. 36.

The Manual of Correctional Standards, issued in 1966 by the American Correctional Association, notes:

> "It should be clear that the revocation hearing is informal in nature and conducted solely for the purpose of the review of information upon which the parole board will or will not revoke a parole. Formal or adversary-type hearings should not be permitted, and the files of the board should remain confidential for the benefit of the prisoner as well as the parole system. The alleged violator should be able to file in his own behalf any reasonable number of oral or written statements by himself or by others which are pertinent and which will assist the board in its determination with regard to possible revocation."

It is the parolee himself, not his representative, who is the subject of the determination whether or not he is the type of person who should be released under the Board's custody in the community. The only legitimate purpose that an attorney representing him could fulfill is to present the arguments, or evidence if necessary, which would tend to explain, deny or mitigate the charges against the parolee. Under the Kansas procedure, this can be accomplished, even though the attorney is not actually present with the parolee at the hearing. As a matter of fact, this did occur in Johnson's case.

> "While representation by counsel may be essential to a meaningful appearance in some extraordinary parole proceedings, it is not essential in the kind of routine revocation hearing with which we are here concerned. The differences between such proceedings in criminal trials are so great that procedural requirements quite appropriate to trials ought not to be

mechanically imposed in absolute terms upon parole boards. . . .

". . . A rigid imposition of a procedural requirement for all cases, which serves no useful purpose in most but which unduly burdens the entire process, would be a long step backward, not forward, in the protection of personal liberties." *Jones* v. *Rivers, supra,* at 878-79.

And, as this Court has noted previously,

"Probation workers making reports of their investigations [such as parole officers] have not been trained to prosecute but to aid offenders." *Williams* v. *New York,* 337 U.S. 241, 249 (1949).

The Kansas procedure concerning representation at parole revocation hearings conforms to the announced federal standards with regard to due process right to counsel. Assistance is permissible, only appearance at the actual hearing may be prohibited.

Having previously considered that the broad due-process allegations contained in the petition are inappropriately presented here for review since they were not presented below, we only pause to briefly comment concerning due process as it applies to administrative parole revocation hearings. Due process is a rather indefinite term that means different procedures for different types of proceedings. Consequently, while for some proceedings due process contemplates an adversary proceeding and the right to confront witnesses while being represented by counsel, it may not for others, such as seeking information to furnish the basis for imposition of sentence. *See, Williams* v. *New York, supra,* at 248-250.

Concerning sentencing this court noted "the due process clause should not be treated as a device for freezing

the evidential procedure of sentencing in the mold of trial procedure." *Williams, supra*, p. 250. And as the Fourth Circuit has noted:

> "Due process of law varies widely with circumstances. It is one thing in a prosecution for crime, is another thing in administering the parole system. The Board of Parole must obey applicable legislation, but otherwise it is only required to perform its functions fairly, under fair procedures; it may not act unreasonably, capriciously or arbitrarily. Freedom, on parole from confinement in a penal institution prior to serving all of an imposed sentence, is a matter of legislative grace—it is neither constitutionally guaranteed nor a God-given right. Parolees are neither totally free men against whom the government is proceeding for commission of a crime, nor are they prisoners being disciplined within the walls of a federal penitentiary—they stand somewhere between the two." *Jones, supra*, p. 874.

And as a lower district court we think appropriately commented:

> "A revocation hearing is not a trial requiring an adversary proceeding. The right to counsel may not be built upon the privilege of probation. The sentencing process is ended: No substantial right of the defendant is in jeopardy. The judge is within his province; he may take what he has given using sound judgment and exercising the discretionary power inherent in our judicial system." *Holder, supra*, p. 381.

The same appropriate use of the discretionary powers of the State Administrative Board of Probation and Parole apply in a case such as this.

We will not belabor the point by citing additional authority supporting the proposition that in an administrative hearing of this type due process of law does not mean the same thing that it would in a criminal adversary

proceeding. We have invited the Court's attention to a few more prominent authorities on the point. However, we wish to pursue the matter a little further by noting that the procedure, outlined several times previously, provided by the Kansas statutes concerning a parole revocation hearing present tools to the parolee facing possible revocation which allow him to contest and deny the charges against him. We think under any concept of fundamental fairness the tools inherent in the statutes, *viz.*, the right to the assistance of counsel to the extent of advice and consultation, and submission of written documents of any sort or nature to the Parole Board, the possibility of subpoenaing witnesses or documents, the notice of charges upon which the hearing is predicated, an opportunity to appear before the Parole Board in person and testify,—require the conclusion that statutory framework is fair. The only request Johnson made which was denied, other than being allowed to retain his status as a parolee, was that his retained counsel be sitting at his side during the hearing before the Board. The record does not reveal that any demand or even request was made for the production of witnesses or papers. The record does not reveal any refusal on the part of the State Board to permit Johnson's attorney to present whatever supporting documents he thought pertinent to the Board, and as a matter of fact the Board indicated that it had considered those documents. (R. 41)

In closing, we note also that there are procedures available to correct any arbitrary or capricious action of the State Parole Board. Johnson attempted to do so in this state habeas corpus case. The state trial court and the Kansas Supreme Court determined on the facts as a matter of state procedure that he had not sustained his burden of proof in overcoming the presumptions which

existed under state law. That is an adequate ground for sustaining the trial court's judgment. If Johnson wished to proceed further, he could bring an action in the Federal District Court in the nature of habeas corpus alleging the illegality of this detention under the Laws and Constitution of the United States.

CONCLUSION

While we feel that Johnson's case is now moot since he has been released from custody of the institution itself, and is again on parole in Story City, Iowa, and we further believe that several of the contentions raised in the petition are inappropriately raised as they were not presented to the Kansas Supreme Court, we've taken the time to present our views concerning the nature of the administrative parole system in Kansas, as well as what we believe to be the present interpretation of constitutional rights in the context of that procedure. Obviously, any interpretation of the constitutional rights applicable to a parole revocation hearing is premised upon the viewpoint from which one views the parole system. Regardless of the method by which one's analysis of parole system is considered, one glaring fact remains. No one has a right to a parole. The only authority for a parole is that granted by statute, federal or state. Granting of a parole after one has been institutionalized is the equivalent of transferring a criminal defendant from behind the walls to in front of the walls. The parolee is not free, he is still in the custody of the state penal system. He is no longer in the same position, vis-a-vis those protections designed to protect individuals from oppressive governmental authority prior to the time that they are convicted of a crime. He is in a different position vis-a-vis those protections than he was when the criminal proceeding against

him started. To assume that the privilege of serving his sentence in the community, and it must be remembered that his sentence is still being served while he is on parole, again attaches those rights available to the criminal defendant when the criminal procedure against him began, is to overlook the obvious distinction between the two. The petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 463

JOHN D. JOHNSON,

Petitioner,

—v.—

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

This case is not moot.

Respondent's first and major point in urging that certiorari should not issue in this case is that "The Petition is Moot Because Johnson is No Longer Institutionalized" (Resp. Br. p. 7), and "There 'is no subject-matter on which the judgment of this Court could operate. . . .'" (Resp. Br. p. 8). This contention is mistaken. The record and briefs agree that petitioner was placed on parole August 16, 1966, and that parole was revoked in the proceedings which gave rise to this petition on July 25-26, 1967. (Pet. Br. pp. 1, 2; Resp. Br. pp. 6, 7).

The laws of Kansas pertinent to this point provide:

". . . When a prisoner on parole or conditional release has performed the obligations of his release for such time as shall satisfy the board that his final release is not incompatible with the best interest of society and the welfare of the individual, the board may make a final order of discharge and issue a certificate of discharge to the prisoner; *but no such order of discharge shall be made in any case within a period of less than one year after the date of release* except where the sentence expires earlier thereto. Such discharge, . . . shall have the effect of restoring all civil rights lost by operation of law upon commitment, and the certificate of discharge shall so state. . . ." K. S. A. 62-2252 (1957) (italics added).

Petitioner's position before the parole revocation was that he had worked his way to within twenty-two days of eligibility for final discharge, and restoration of his civil rights, with all this implies. In August, 1969 petitioner's petition for certiorari was filed and served upon respondent. Then, as respondent's brief informs us, "On September 9, 1969, a *second parole* was granted . . . to Johnson." (Resp. Br., p. 8) (italics added). After that action, petitioner was again a full year away from eligibility for consideration for discharge and restoration of his civil rights, instead of 22 days away, because he had had his first parole revoked in a proceeding repugnant to the United States Constitution on the grounds raised in his petition for certiorari. Petitioner should at this very moment be eligible for consideration for discharge and restoration of civil rights; instead, because of the invalid and unconstitutional revocation of his first parole, he is denied by Kansas statute this eligibility until

September 9, 1970. It is possible this period of parole could stretch to 1974.

Thus petitioner is still subject to the severe handicaps placed upon a parolee by the State of Kansas:

> "It must be remembered our statute, in clear and unequivocal terms, provides that a convict on parole, although permitted to go outside the prison walls, is still in legal custody and subject at any time to be taken back within that institution. The authorities hold that under such a statute a parolee is still in *custodia legis,* he is subject to the rules and regulations of the penitentiary from which he has been paroled even though permitted to remain outside its walls, and he is subject to the direction and control of the authorities placed in charge of that institution.
>
> * * * * *
>
> In revoking petitioner's parole, in ordering his arrest, and in having him brought back to the penitentiary the respondent was simply performing powers and duties of prison discipline and management conferred upon him by statute." *Ex Parte Tabor,* 173 Kan. 686, 250 P. 2d 793, 797 (1952).

This is the law of Kansas to this day. (See *Hunt* v. *Hand,* 186 Kan. 670, 352 P. 2d 1, 2, 3 (1960), to the effect that the revision of some of the Kansas statutes since 1952 had not impaired this view.) The continuation of such substantial burdens on a prisoner because of unlawful action by the state renders this action very much alive.

Moreover, this action is not moot because there is "subject-matter on which this Court can operate" to accom-

plish specific relief for petitioner. Should this Court find that petitioner's parole was unconstitutionally revoked, it should place him insofar as possible in the position in which he would otherwise have been. This would require an order that the Kansas Parole Board consider petitioner eligible for parole now instead of September 9, 1970 without any prejudice resulting from his reincarceration in July, 1967. The result of a favorable ruling in this Court would therefore be: (1) petitioner could be considered for immediate parole, and (2) the Kansas Parole Board would be obliged to ignore the parole revocation, the grounds upon which it was based, and the period of petitioner's reincarceration. Petitioner could be released from parole altogether and his full civil rights restored following immediate consideration by the parole board. When so substantial a result can flow from the decision of this Court in this case, there can be no argument that this case is moot.

The loss of the right to be discharged from parole status and to be a free man with full civil rights for a period of nearly 49 months (July 25, 1967–Sept. 9, 1970) less 22 days, is clearly a matter of sufficient moment that prevents this case from being moot. After being served the petition for certiorari in this case, the state released petitioner. The state should not be allowed to save a procedure rife with unconstitutional features by blithely releasing a prisoner to suffer the prejudice that has clearly resulted from the parole revocation at issue here. This Court should invalidate the Kansas parole-revocation procedure and order that petitioner be considered eligible for parole.

II.

All the points raised by petitioner in this Court were considered by the Kansas Supreme Court.

Respondent's brief (9-11) claims that "broad" due process arguments were not raised in the state courts, that the petitioner argued only that the parole board was "arbitrary and capricious," not that it violated the Fourteenth Amendment. Assuming, as respondent does, that those two arguments are radically distinct, it is clear from the opinion of the Supreme Court of Kansas (Pet. for Cert., Appendix) that all of the elements of fairness specified in the Sixth Amendment (Pet. for Cert. 9) were considered in the state court:

—The state court held that *no* constitutional right is involved, in *any* parole-board case (App. 7a).

—The state court adopted the same *broad, negative* position on the federal Constitution which the Washington state court adopted in *Mempa;* parole, the Kansas court said, "must be measured, not by legal rules, but by the judgment of those who make it their professional business." (App. 6a-7a.)

—Every point in the petitioner's first argument (Pet. for Cert. 6-11) is based on the Sixth Amendment, which was fully argued in the state court and discussed and rejected there, in favor of statutory guidelines (App. 7a-9a). Every one of the constitutional safeguards is rooted in and implemented by the right to counsel. *Townsend* v. *Burke*, 334 U. S. 736 (1948), discussed by the state Supreme Court at App. 6a.

—The state court's opinion on the issue of appropriate remedy (App. 10a-11a) turns on whether the parole board's decision was arbitrary or capricious, and on that court's presumption of correctness as to parole-board procedures. Fundamental fairness is the basis for the state court's discussion, for the petitioner's first argument, and for the Fourteenth Amendment. For example, both the state court (App. 7a) and the petitioner (Pet. for Cert. 10) point this Court to the controlling decision in the federal Court of Appeals which sits for Kansas—*Gonzales* v. *Patterson*, 370 F.2d 94 (10th Cir. 1966); that decision holds that there is no due process limitation—"from a broad viewpoint" (Resp. Br. 9)—on state parole boards. It is a decision in conflict with other Courts of Appeal (Pet. for Cert. 10-11).

Respondent claims that the third issue in petitioner's brief (Pet. for Cert. 22-23) was not presented below. It was. Petitioner's claim is that his parole may not be revoked solely because he has been accused and acquitted of a new crime. Respondent's contention that this point is new in this case is based on the double jeopardy rationale for this point included in petitioner's brief. The Kansas Supreme Court decided this point as a due process question when it recognized that the factual basis on which a parole board acts is a due process question and cited *Townsend* v. *Burke*, 334 U. S. 736, in support of its conclusion (Pet. for Cert., App. 6a). Just before the petition for certiorari in this case was filed this Court decided *Benton* v. *Maryland*, 395 U. S. 784 (1969) which held that the due process clause of the Fourteenth Amendment com-

prehends double jeopardy. It therefore seemed appropriate to bring this issue to the attention of this Court in this case, but we stand on the due process basis upon which this point was explicitly decided by the Kansas Supreme Court.

III.

Petitioner relies only on the record that was before the Kansas Supreme Court.

Respondent's brief (p. 11) complains that the transcript of the state district court was not before the state supreme court. The claim is erroneous. Most of the record below consists of this same transcript (R. 3-27, pleadings; R. 28-35, testimonial record). Because the abstracted testimonial record in the state Supreme Court was not complete, petitioner filed a *complete* transcript from the state trial court after requesting the advice of the Office of the Clerk of this Court by phone. However, no essential argument advanced by petitioner rests on this separate transcript. All material facts are in the state supreme court's transcript, and all of the petitioner's quotations from the record (see Pet. for Cert. 4) come from it (R. 29-34).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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